HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 425

JOHN B. STRICKLAND

vs.

SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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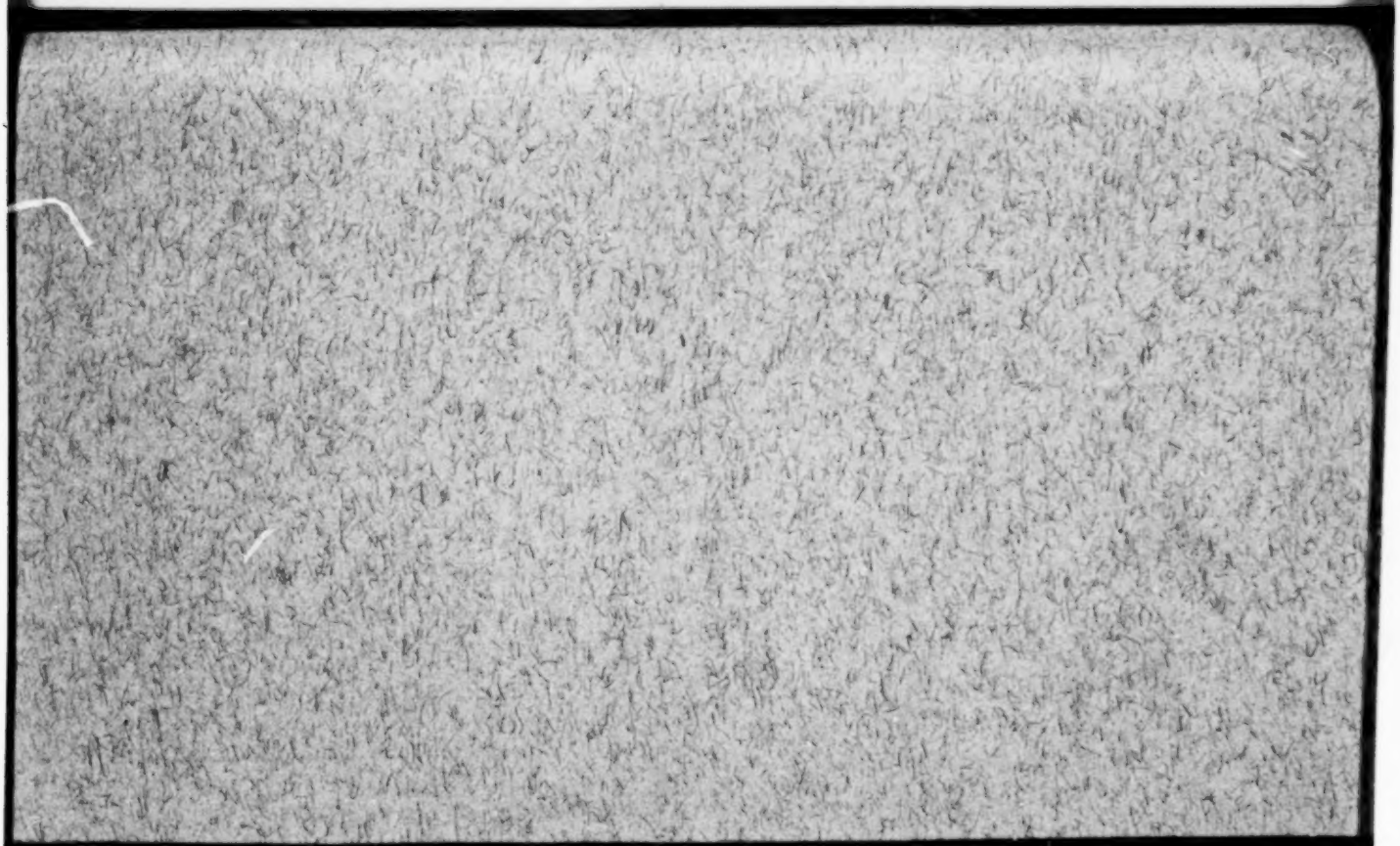

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. _____

JOHN B. STRICKLAND

vs.

SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, John B. Strickland, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida reversing the judgment for petitioner entered by the Circuit Court for the Eleventh Judicial Circuit of Florida and directing the trial court to enter a final judgment for the respondent.

OPINION BELOW

The opinion below is reported in 80 So. 2d 914 and is set out in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

QUESTION ONE

Does a state appellate court invade the province of the jury and violate the scope of appellate review in Federal Employers' Liability Act cases by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:

A railroad employee is required to remove a 118 pound brake beam from a car, at night over a flat track; that to do so the employee must squat under the car with poor light and footing and with a sharp metal corner of a switchbox a few inches from his back, although better light had been requested and not supplied and the employee had protested against doing such heavy work under such circumstances; and the employee had to twist, jiggle and lift the heavy beam by himself to clear a series of belts and wheels, and while doing so he slipped and fell backward, gouging his back on the switchbox corner; and experts testified that it was "easier and safer" to do the work over a pit since there would be better footing and lighting with ample room for two men to do the heavy lifting together; and at the time of the accident such a workpit was available just eighteen feet away?

QUESTION TWO

Under the Federal Employers' Liability Act, when there is a readily available place where the work involved can be done in an easier and safer manner, does a state appellate court err in setting aside a jury finding of negligence because this jury finding "would have the effect of requiring the defendant to change its operational policy as to this particular operation, under penalty of being held responsible in damages if it fails to do so", and would "hold the defendant liable for a customary practice of long standing"?

QUESTION THREE

Is the concept of a "reasonably safe place to work" as used in the Federal Employers' Liability Act a relative term allowing jury inquiry as to what safer methods could have been used under the circumstances; or did the Supreme Court of Florida correctly hold that the concept is an absolute term and the place actually furnished is either safe or unsafe under any and all circumstances?

STATUTES INVOLVED

The pertinent provisions of the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et. seq. are set out in Appendix B.

STATEMENT

In an action under the Federal Employers' Liability Act, petitioner recovered a jury verdict and final judg-

ment for $8,830.36 against respondent in the Circuit Court of Dade County, Florida (R. 1-2, 486-487). On appeal, the Supreme Court of Florida reversed and directed entry of a final judgment for the railroad. The Court's action was prompted by its finding that on the issue of whether petitioner sustained injuries resulting in whole or in part from the railroad's negligence, "the evidence was indeed meager and, in our opinion, insufficient . . ." 80 So. 2d at 917.

Petitioner's complaint alleged that his injuries resulted from the railroad's negligence in furnishing him an unsafe place to work, unsafe tools and appliances and insufficient fellow workers (R. 1-2). Viewing the evidence on these issues in the light most favorable to the jury verdict below as federal law demands, the record shows the following:

Petitioner, one of the railroad's carmen, was ordered to change an outside brake beam on a car while it was on a flat track in the railroad's repair yards (R. 215-216). It was dark at the time (R. 56, 215-216, 270), and the beam weighed 118 pounds (R. 96). To do the work, petitioner had to crawl under the car and assume a squatting position with the sharp corner of a heavy metal switch box a few inches from his back (R. 112-114).

It was necessary for petitioner to lift, twist and jiggle the beam to slip it through a series of four belts before he could remove it from the car (R. 102-103, 224-227). In addition, petitioner had to pull the beam towards him about seven inches to clear the car wheels (R. 217-218).

While wrestling with this 118 pound beam, petitioner had to squat on the flat track's footing of rocks, sand and railroad ties (R. 228-229). Presence of the car on the flat track also required petitioner to work with poor lighting (R. 84, 86, 270), although petitioner had requested a better light before the accident and had not been given one (R. 258-259). Good lighting was needed to see where and how the beam was catching on the four belts (R. 227). While pulling on the beam, petitioner slipped and fell backward gouging his spine on the sharp corner of the switchbox (R. 240).

Just eighteen feet (R. 112) from the flat track where petitioner was required to change the beam was a work pit which had available space at the time (R. 221, 58-59). This pit had good footing and lighting (R. 63-64, 118, 228-229). The job of changing the beam could be done while standing up in the pit and working overhead; and two men could work together lifting out the heavy brake beam (R. 181-182); whereas one man had to pull out the beam by himself when required to work in the close quarters of the flat track (R. 120-121, 183, 252-253, 307, 51). If petitioner had been allowed to change the beam on this work pit it would have been impossible for him to hit his back on the switchbox since he would have been standing in the pit below the car.

For the above reasons, expert carmen testified that it was both easier and safer to change the beam while the car was over a pit (R. 182, 193). A provision of the company-union contract stated that "where the nature of the work requires it, locomotive and passenger cars will be

placed over a pit if available" (R. 67-68), and before the accident petitioner and possibly others had gone to the union committeeman and protested against having to change break beams on a flat track (R. 258, 339-340).

The above evidence on whether petitioner's injuries resulted in whole or in part from the railroad's negligence is what the Supreme Court of Florida characterized as

> ". . . indeed meager and, in our opinion, insufficient to justify this court's affirming a judgment which would have the effect of requiring the defendant to change its operational policy as to this particular operation, under penalty of being held responsible in damages if it fails to do so. This is particularly true in view of the fact that the plaintiff is seeking to hold the defendant liable for a customary practice of long standing which neither he nor any other workmen, so far as the record shows, had ever complained about to the defendant's officers or supervisory employees." 80 So. 2d at 917.

In addition, the Supreme Court of Florida held that the concept of a "reasonably safe place to work" is an absolute term in that the place to work is either safe under all circumstances or unsafe under all circumstances, saying at 80 So. 2d 917:

> "The plaintiff leaves unanswered the question—inherent in the problem—of whether the defendant would have been guilty of negligence if no

track over a pit had been available on this particular evening, or if it had been found necessary to change a brake beam on a flat track out on the road, rather than in a yard. Is a flat track a reasonably safe place to change a brake beam if no pit is available, and is it not reasonably safe if one is? The question answers itself."

FEDERAL QUESTIONS RAISED

The complaint (R. 1-2), the opening statement(R. 44-51), and the conference on jury instructions (R. 389-407), all show petitioner's repeated assertions in the trial court of his rights under the F. E. L. A. The specific questions raised by this petition were raised on petition for rehearing before the Florida Supreme Court (R. 520-540), and by their nature could not be raised until such court had decided the case.

REASONS FOR GRANTING THE WRIT

Petitioner urges the Court to grant this petition for a writ of certiorari to the Supreme Court of Florida for the following reasons:

1. The decision below that "meager" evidence will not support an employee's jury verdict in a Federal Employers' Liability Act case violates the test of appellate review as announced by this Court in **Lavender v. Kurn**, 327 U. S. 645, and is contrary to this Court's mandate in **Bailey v. Central Vermont Ry.**, 319 U. S. 350, 354, that "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

2. The Supreme Court of Florida has decided important questions regarding the concept of negligence under the F. E. L. A., contrary to the decisions of this Court. The Florida court's refusal to allow a jury to find negligence in the railroad's failure to use a readily available place to work which was easier and safer because such finding would upset the railroad's "operational policy" and "customary practice of long standing" is in direct conflict with the federal law. E. g., **Texas & P. R. Co. v. Behymer,** 189 U. S. 468; **Terminal R. Ass'n. of St. Louis v. Schorb** (C. A. 8, 1945), 151 F. 2d 361, cert. den. 326 U. S. 786. As these cases hold, the jury and not the railroad sets the standard of care.

The Florida court's holding that the place actually furnished to do the work is either safe or it is not and that inquiry into the availability of safer methods is immaterial, is contrary to numerous federal decisions to the effect that what a defendant could have done is relevant in determining what he should have done. The statement of the Florida court that:

> "'The plaintiff leaves unanswered the question —inherent in the problem—of whether the defendant would have been guilty of negligence if no track over a pit had been available on this particular evening, or if it had been found necessary to change a brake beam on a flat track out on the road, rather than in a yard. Is a flat track a reasonably safe place to change a brake beam if no pit is available, and is it not reasonably safe if one is? The question answers itself.'"

conflicts with this Court's holding in **Bailey v. Central Vermont Ry.**, 319 U. S. 350, 353, that:

> "'The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, **the fact that the car could have been opened or unloaded near the bridge on level ground**—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with **that particular place in which to perform the task was negligent.** The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury.'"

3. The decision of the Court below, if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F. E. L. A. The law as announced by the Florida court allows interstate railroads to avoid jury findings of negligence merely by showing that such finding would upset their "operational policy" and "customary practices of long standing". In addition, the Florida opinion prevents injured employees from proving negligence by proving that the railroads could, with relative simplicity, have provided them with "easier and safer" working conditions.

4. The decision below is clearly wrong and deprives an injured man of $8,830.36 to which he is clearly entitled under federal law.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

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APPENDIX A

OPINION OF THE SUPREME COURT OF FLORIDA

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1955
SPECIAL DIVISION B.

No. 26,165

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

vs.

JOHN B. STRICKLAND,
Appellee.

Opinion filed May 25, 1955.

An Appeal from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Shutts, Bowen, Simmons, Prevatt & Julian and Leo S. Julian, for Appellant.

Nichols, Gaither, Green, Frates & Beckham and William Frates, for Appellee.

ROBERTS, J.:

This is an appeal by the defendant from a verdict and judgment in favor of plaintiff in a suit filed by him against the defendant under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, to recover damages for personal injuries allegedly sustained by him because of the negligence of the defendant in failing to provide him with a reasonably safe place to work. On this appeal, the defendant contends, inter alia, that the evidence was not legally sufficient to support the jury's verdict, so that the trial judge erred in refusing to direct a verdict in its favor. Because of the view which we entertain as to this question, it is unnecessary to refer to or answer the other question propounded by the defendant.

In cases arising under the Act in question, this court is required to determine questions relating to the negligence of the employer in accordance with the principles of law established and applied by the Federal courts. **Urie v. Thompson,** 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282. It might be well to re-state them at the outset, as follows:

The Federal Employer's Liability Act does not make the railroad company the insurer of the safety of its employees while they are on duty. The basis of its liability is its negligence, not the fact that injuries occur. **Ellis v. Union Pacific R. R.,** 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572. As in other negligence cases, the issue of negligence is ordinarily for the jury to determine, and "a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be com-

mensurate to the dangers of the business.' " **Tiller v. Atlantic C. L. R. Co.** (1943), 318 U.S. 54, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610." **Wilkerson v. McCarthy** (1948) 336 U. S. 53, 61, 69 S. Ct. 413, 417, 93 L. Ed. 497. "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." **Lavender v. Kurn,** 327 U. S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916.

The facts developed by the evidence were as follows: The plaintiff was injured while changing an "outside" brake beam, weighing 118 pounds, underneath a Pullman car. He was assisted by three men on the outside of the car. In order to disengage the beam from belts which supported the beam after it was uncoupled, so that it would not hang on the belts as it was being pulled to the outside of the car it was necessary for the workman underneath the car to assume a sitting or squatting or stooping position. The plaintiff, while in a squatting or stooping position, and in the process of disengaging the beam from the belts, slipped and fell back against a switch box which was a permanent fixture extending down from the floor of the car, injuring his back. The roadbed of the track upon which the car was situated was filled with sand and gravel, and there was no evidence that on this particular evening it differed in any way from its usual and normal condition. The accident happened at night, and the plaintiff had the usual lighting of a carbide lamp and a flashlight. There was evidence that an electric light on a drop cord was available, upon request, although plaintiff testified his request was not complied with until after the accident. The plaintiff testified that he did not know what caused him to slip.

There was evidence from which the jury could have found that space was available on this particular evening on a track over a pit in which the plaintiff could have assumed a standing position while changing the beam. Two of plaintiff's witnesses testified that it was "safer" to do the work in a pit, and several said it was "easier," and all testified that they would rather do the work in a pit than on a flat track for that reason. None of them said that it was not safe to do the work on a flat track. Much testimony was devoted to the lighting and footing in a pit, as compared with that on a flat track. It was also shown that, if the car had been over a pit, the plaintiff could have had the assistance of a helper inside the pit.

It was shown that it was the custom of the defendant to have outside brake beams changed on a flat track. The defendant's general car foreman, who was called as a witness for plaintiff, testified that it was not "necessary or required" to move a car over a pit to do this work, and that it would not have been possible to get the trains out on time if they had to switch to a pit each car that had to be worked on. A witness employed by another railroad company testified that it was the custom of his company to change brake beams over a pit "if it was convenient". There was no evidence that the defendant's officers or supervisory employees had ever been requested to change its custom respecting the changing of outside brake beams. The plaintiff, during his years of railroad service, had changed brake beams both on a flat track and in a pit. He had been injured two years before by bumping into a projection on a car while emerging from a pit after changing a brake shoe on the car.

From what has been said, it is apparent that the plaintiff sought to prove the issue made by the pleadings —that is, whether the defendant was negligent in failing to provide him with a reasonably safe place to work—by showing that the footing and lighting were better in a pit, where plaintiff could have had a helper, and that it was unreasonable—and thus negligent—for defendant to require him to do the work on a flat track when a pit was available. There can be no doubt that there were sufficient "probative facts," if believed by the jury, to show that it was easier and safer to change a brake beam in a pit rather than on a flat track. But we know of no rule of law which requires a railroad company to provide a workman with an easier and safer place to work if the one provided is, as a matter of fact, reasonably safe. The plaintiff leaves unanswered the question—inherent in the problem—of whether the defendant would have been guilty of negligence if no track over a pit had been available on this particular evening, or if it had been found necessary to change a brake beam on a flat track out on the road, rather than in a yard. Is a flat track a reasonably safe place to change a brake beam if no pit is available, and is it not reasonably safe if one is? The question answers itself.

On the issues of whether a flat track is a reasonably safe place for the operation in question and, if not, was its unsafe condition the proximate cause, in whole or in part of the plaintiff's injuries—which were the only issues properly before the jury—the evidence was indeed meager and, in our opinion, insufficient to justify this court's affirming a judgment which would have the effect of re-

quiring the defendant to change its operational policy as to this particular operation, under penalty of being held responsible in damages if it fails to do so. This is particularly true in view of the fact that the plaintiff is seeking to hold the defendant liable for a customary practice of long standing which neither he nor any other workmen, so far as the record shows, had ever complained about to the defendant's officers or supervisory employees.

While we will not hesitate to affirm a judgment based upon negligence in an operational policy when the unsafe nature of that policy is made apparent, **Seaboard Air Line R. Co. v. Hardee,** Fla., 1951, 54 So. 2d 809, we have a corresponding duty to reverse such a judgment "where there is a complete absence of probative facts to support the conclusions reached." So long as the Congress of the United States, by its lawful Acts, requires proof of negligence on the part of a railroad company before it can be held responsible for its industrial accidents, just so long must we require strict adherence by the lower courts to the common-law concept of negligence, which is that "the negligent act or omission must be shown and proven and it must be shown that it was the proximate cause of the accident which resulted in the injury." **Seaboard Air Line R. Co. v. Gentry,** Fla. 1950, 46 So. 2d 485, 487.

For the reasons stated, the judgment appealed from is reversed with directions to enter judgment for the defendant.

DREW, C. J., TERRELL, J., AND PARKS, ASSOCIATE JUSTICE, CONCUR.

APPENDIX B

PERTINENT PROVISIONS OF FEDERAL EMPLOYERS' LIABILITY ACT

45 U.S.C. Sec. 51 provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such com-

merce and shall be considered as entitled to the benefits of this chapter.

45 U. S. C. Sec. 53 provides:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: **Provided,** That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. Sec. 54 provides:

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

APPENDIX C

JUDGMENT OF THE SUPREME COURT OF FLORIDA (R. 518)

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A. D. 1955

WEDNESDAY, MAY 25, A. D. 1955

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

-vs-

JOHN B. STRICKLAND,

Appellee.

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby reversed with directions to enter judgment for the defendant; it is further ordered by the Court that the Appellant do have and recover of and from the Appellee

its costs by it in this behalf expended, which costs are taxed in the sum of $_____, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice ROBERTS was this day ordered to be filed.

APPENDIX D

ORDER OF SUPREME COURT OF FLORIDA ON PETITION FOR REHEARING (R. 542)

IN THE SUPREME COURT OF FLORIDA

JUNE TERM A. D. 1955

THURSDAY, JUNE 30, A. D. 1955

SEABOARD AIR LINE RAILROAD COMPANY,

Appellant,

-vs-

JOHN B. STRICKLAND,

Appellee.

Counsel for Appellee having filed in this cause Petition for Rehearing and having been considered it is ordered by the Court that the Opinion be and the same is hereby corrected by striking from the seventh line from the bottom of page 4 the words "by his helpers"; and on page three, fifth line from the top of the page the language "if he had requested it" has been changed to read "upon request, although plaintiff testified his request was not complied with until after the accident", the petition visited to the corrected opinion and is denied.

A true copy,

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court

(THE MANDATE IN THIS CASE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT FOR DADE COUNTY)

OCT 21 19
HAROLD B. WILLEY

No. 425.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

JOHN B. STRICKLAND,

Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 425.

JOHN B. STRICKLAND,

Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Court of Florida (App. A of Petition), as modified by the order of the Supreme Court of Florida on petition for rehearing (App. D of Petition) is reported at 80 So. 2d 914.

Questions Presented.

The respondent is dissatisfied with the manner in which the "Questions Presented" are set forth in the petition and submits that the following are the questions properly presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail:

1. Where a railroad employee sues under the Federal Employers' Liability Act charging the railroad with negligence in furnishing a dangerous and unsafe place in which to work and with failing to provide a reasonably safe place to work and the only testimony offered to support those charges was that the employee apparently slipped while engaged in removing a brake beam from a railroad car on a flat track, but that he did not know what, if anything, he slipped on, and where there was no evidence to support any other charge of negligence, and the record affirmatively shows that neither the injured employee nor any other employee had made any complaint to the railroad of the condition of the place in which he was working or of the manner in which the work was being performed, which was in accordance with a customary practice of long standing, and where there was no testimony that it was not safe to do the work on a flat track, did the Supreme Court of Florida correctly rule that there was insufficient evidence to support a verdict for the employee?

2. With reference to a railroad's duty to furnish its employees a reasonably safe place to work, does the Federal Employers' Liability Act require a railroad to abandon a customary operational procedure of long standing, which is not shown to be unsafe, and adopt a different procedure when such a change would require the railroad to substantially alter its existing facilities and operational procedure, under penalty of being held responsible in damages if it fails to do so?

3. Does not the Federal Employers' Liability Act require an employee, who predicates his claim thereunder upon his employer's negligence in failing to furnish him a safe place to work, to prove by the preponderance of the

evidence that the specific place in which he was working at the time of his injury was not a reasonably safe place to work?

Statute Involved.

The only statute involved in this case is 45 U. S. C., Sec. 51 (App. B of Petition).

Statement.

(A) An important question was not referred to or answered by the Supreme Court of Florida.

The respondent presented two questions to the court below upon which respondent contended that the trial court was in error:

> (1) in refusing to direct a verdict for the respondent, and
>
> (2) in denying the respondent's motion for a new trial.

The Supreme Court of Florida, sometimes referred to herein as the court below, concurred with respondent's contention under (1) that the respondent should have received a directed verdict, and the court below reversed the judgment with directions to enter judgment for the respondent, saying (Appendix A to the petition, p. ii):

> "Because of the view which we entertain as to this question, it is unnecessary to refer to or answer the other question propounded by the defendant."

The "other question propounded by the defendant" was based upon testimony by petitioner's counsel, prejudicial remarks in the presence of the jury, and improper argu-

ment to the jury, which the respondent contended had denied to it a fair trial, in derogation of its rights under Sections 4 and 12 of the Declaration of Rights of the Constitution of the State of Florida and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Counsel for the respondent are aware that this Court in two recent cases arising under the Federal Employers' Liability Act (45 U. S. C. Sec. 51, et seq.), by *per curiam* orders, one dated February 28, 1955, and the other dated October 10, 1955, has, in the same order, granted petitions for certiorari and reversed the judgments below, presumably, as we understand the practice, without having the record printed and without oral argument.[1]

Counsel are not aware of any similar *per curiam* order upon a petition for writ of certiorari to review a judgment of a state court, but an unfortunate procedural situation might result if that were done in this case, and the respondent might be denied its day in court on an important question raised in the court below but not referred to or answered in its opinion. We are not, of course, confessing error, as we feel the petition for certiorari should be denied. On the other hand, if the petition is granted, the other question should either be considered by this Court on its own motion (Cf. *New York Central R. Co.* v. *Johnson*, 279 U. S. 310) or the Supreme Court of Florida should not be precluded from considering it.

The record speaks for itself with respect to what transpired at the trial, and shows the undisguised appeals to the passion and prejudice of the jury. We give here the record references to some examples (R. 106, 116, 205, 206, 207,

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[1] *Smalls* v. *Atlantic Coast Line R. Co.*, 349 U. S. 907, which came up from the Court of Appeals for the Fourth Circuit, and *Anderson* v. *Atlantic Coast Line R. Co.*, Docket No. 143, October 10, 1955, which came up from the Court of Appeals for the Fifth Circuit.

208, the Brittingham correspondence, R. 483, 484, 485, which was read to the jury, R. 209, and the argument to the jury based on that correspondence, R. 419, 420, 421, 422, and the closing remarks to the jury, R. 463 to 468, inclusive). If the social philosophy of the Federal Employers' Liability Act is that the fact of injury entitles the employee to the verdict of a jury it would seem doubly the duty of the courts to protect the integrity of the process.

We do not believe that the respondent was under a duty to file a conditional petition for certiorari, as the question thus raised was not referred to or answered by the court below, and, upon such a petition, there would have been no adverse judgment of the court below to be reviewed, even if this Court should determine to reverse the Supreme Court of Florida on the question that was passed upon by that court, (Cf. *McComb* v. *Farmers Reservoir and Irrigation Co.*, 335 U. S. 809, 337 U. S. 755). The fact that this Court has the power to consider that question upon its own motion, and in this very proceeding, did not impose upon the respondent the obligation to file a procedurally incorrect conditional petition for certiorari.

(B) Supplemental Statement of Facts.

The accident occurred at approximately 5:30 A. M. on January 6, 1953 (R. 56, 57, 236), and the petitioner lost 70 or 80 days' time and was back working for the respondent at the time of the trial (R. 233). The petitioner testified that as he was pulling the brake beam out (R. 227), "It seemed apparent to me that I slipped." On cross examination he testified that he didn't know what he slipped on (R. 238).

The accident occurred at the respondent's Miami (Hialeah) yards. There were three passenger trains being

inspected and repaired in those yards the night of petitioner's injury (R. 75, 77). The petitioner was engaged in routine inspection and repair work on the respondent's Orange Blossom Special (R. 56, 78). Eleven brake beams had been taken out of that same train that same night, while the train was standing on the flat track (R. 125, 126).

The petitioner testified on direct examination that three men were helping him (R. 214), that one helper was on the opposite side of the car passing tools to him (R. 223), and that he had removed brake beams of that type before on the flat tracks but that it was easier to remove the brake beam on the pit (R. 230). He testified that he had both a carbide light and a flashlight with him (R. 223, 239), and he did not testify that he could not see what he was doing. He testified that he hit his back on a terminal square box (R. 231, 240), that he knew it was there, that he saw it before he started removing the brake beam, and that it was a permanent fixture of the car (R. 238). All the testimony on causation comes back to the statement that he slipped and that he didn't know what he slipped on (R. 227, 238).

The "work pit" to which the petition refers was an inspection pit (R. 62). It was on an adjoining track (R. 56, 57, 63, 215) and the fact that it was eighteen feet from the "flat track" on which the petitioner was working is wholly irrelevant. The provision of the "company-union contract" to which the petition refers reads as follows:

> "Rule 50. No employee will be required to work under a locomotive or car without being protected by proper signals. *Where the nature of the work to be done requires it,* locomotives and passenger cars will be placed over a pit, if available." (Emphasis supplied.)

Petitioner's counsel called as a witness the respondent's General Car Foreman, who was called as an adverse witness. On cross examination by respondent's counsel he testified that it was definitely not necessary or required that the car be over a pit to remove the brake beam in question (R. 106), and that testimony is uncontradicted by the testimony of any witness.[2]

We feel that nothing more need be added to the statement of the facts, and we adopt the statement in the opinion of the court below.

Argument.

The decision of the Supreme Court of Florida is clearly correct and is founded upon the concept that an employer is not an insurer of the safety of his employees, but that the basis of the employer's liability is his negligence, and that negligence must be, in whole or in part, the cause of the employee's injury.

This basic and well established principle of law has been consistently adhered to by this Honorable Court in a long line of decisions construing the Federal Employers'

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[2] When Langford testified that it was definitely not necessary or required that the car be over a pit, the following occurred (R. 106):

"Mr. Frates: I move to strike that answer as being a conclusion of this witness.

Mr. Julian: I think he is qualified to——

Mr. Frates: I know he is qualified for the Seaboard to express any opinion.

Mr. Julian: Let's not have any inflammatory remarks.

Mr. Frates: He is asking him a conclusion. You say he is qualified, and I say he is not, and he has gone outside of the scope——

Mr. Julian: You are talking about being qualified for the Seaboard.

The Court: I am prepared to rule on the objection. I will overrule the objection. Go ahead."

Liability Act and is clearly stated by this Court in the case of *Ellis* v. *Union P. R. Co.*, 329 U. S. 649 (Text, 329 U. S. 653):

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. * * *"

The same principle, stated in slightly varying language, has been enunciated by this Court in the following cases: *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573; *Wilkerson* v. *McCarthy*, 336 U. S. 53; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Brady* v. *Southern R. Co.*, 320 U. S. 476; *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272; *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165; *Chesapeake & O. R. Co.* v. *Stapleton*, 279 U. S. 587; *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367; *Erie R. Co.* v. *Winfield*, 244 U. S. 170; *Southern R. Co.* v. *Gray*, 241 U. S. 333.

Following this principle and examining the record on appeal, the Supreme Court of Florida correctly ruled that the petitioner had wholly failed to sustain his burden of proof in the trial court and had failed to prove that respondent was guilty of negligence which contributed in whole or in part to petitioner's injuries.

Under the facts of this case such a conclusion was amply warranted. There was no evidence introduced to support petitioner's charge that the tools and appliances furnished to him by the respondent were unsafe. Neither was there any evidence whatsoever introduced to support petitioner's charge that respondent negligently failed to furnish him with sufficient fellow workers. On the contrary, the evi-

dence shows that petitioner, at the time of his injury, was assisted by three fellow workers and no evidence was introduced to show that they were insufficient in number or incompetent in ability. Last, and perhaps most important of all, in connection with petitioner's charge that respondent was negligent in failing to furnish him a reasonably safe place to work, there was no testimony whatsoever that the specific place in which petitioner was working at the time of his injury was unsafe or was not a reasonably safe place in which to perform the work he was doing.

Even though petitioner testified that he slipped (R. 227), he did not know what he slipped on or even the position of his feet at the time he slipped (R. 238). There was no evidence to show that he slipped because of the condition of the place in which he was working or because of any negligent act or omission on the part of respondent. The statements by petitioner's counsel in his argument to the jury (R. 410 to 413, incl.) were certainly not evidence. The work the petitioner was performing at the time of his injury was being performed in accordance with a customary practice of long standing and the place in which the work was being performed (over a flat track) was also in conformity with customary and standard practice. The record shows that neither petitioner nor any other employee had ever complained to respondent that either the manner of performing this particular work or the place in which the work was customarily performed was not reasonably safe (R. 107).

As this Honorable Court, speaking through Mr. Justice Reed, said in *Brady* v. *Southern R. Co., supra,* (Text 320 U. S. 479-480):

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the dis-

cretion of the trier of fact—in this case, the jury. Western & Atlantic R. Co. *v.* Hughes, *supra;* Baltimore & Ohio R. Co. *v.* Groeger, 266 U. S. 521, 524. *Cf.* Gunning *v.* Cooley, 281 U. S. 90, 94; Commissioners *v.* Clark, 94 U. S. 278, 284. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway *v.* United States, 319 U. S. 372; Pence *v.* United States, 316 U. S. 332; Baltimore & Ohio R. Co. *v.* Groeger, 266 U. S. 521, n 1; Anderson *v.* Smith, 226 U. S. 439; Coughran *v.* Bigelow, 164 U. S. 301, 307; Gunning *v.* Cooley, 281 U. S. 90, 93, note; Seaboard Air Line *v.* Padgett, 236 U. S. 668, 673; Parks *v.* Ross, 11 How 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§ 2494 *et seq.*"

In this case, as the facts show, there was a complete absence of probative facts to support the conclusion reached by the jury. The Supreme Court of Florida so ruled, following the authority of this Court in *Brady* v. *Southern R. Co., supra,* as indicated by the opinion (App. A of Petition, page vi):

"• • • So long as the Congress of the United States, by its lawful Acts, requires proof of negligence on the part of a railroad company before it can be held responsible for its industrial accidents, just so long must we require strict adherence by the lower courts to the common-law concept of negli-

> gence, which is that 'the negligent act or omission must be shown and proven and it must be shown that it was the proximate cause of the accident which resulted in the injury.' *Seaboard Air Line R. Co.* v. *Gentry,* Fla., 1950, 46 So. 2d 485, 487".

This Court denied a petition for writ of certiorari in the *Gentry* case above cited. See *S. A. L. R. Co.* v. *Gentry,* 340 U. S. 853.

Petitioner's contention that the law as announced by the Supreme Court of Florida will allow interstate railroads to avoid jury findings of negligence merely by showing that such findings would upset their "operational policy" and "customary practice of long standing" is without merit. The Supreme Court of Florida carefully emphasized in its opinion (App. A to Petition, page vi) that it would not hesitate to affirm a judgment based upon negligence in an operational policy *when the unsafe nature of that policy is made apparent.* Each case must rest on its own facts and in this case there was an absolute absence of testimony that the respondent's operational policy was unsafe.

Petitioner's further contention that, "the Florida opinion prevents injured employees from proving negligence by proving that the railroads could, with relative simplicity, have provided them with 'easier and safer' working conditions" is likewise devoid of merit. The evidence does not establish that "easier and safer" working conditions could have been provided "with relative simplicity" and petitioner overlooks the basic fact that it is incumbent upon the employee to prove that the place of work he was furnished and where his injury occurred was not a reasonably safe place to work.

Conclusion.

Since the record affirmatively shows that petitioner failed to prove that respondent was guilty of negligence contributing in whole or in part to petitioner's injuries, it is respectfully submitted that the opinion of the Court below is correct and in accord with law and justice and this petition for a writ of certiorari should be denied.

Respectfully submitted,

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